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Native Ecosystems Council v. Marten

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Native Ecosystems Council v. Marten, 883 F.3d 783 (9th Cir. 2018)

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In *Native Ecosystems Council v. Marten*, the Ninth Circuit found that the United States Forest Service did not violate the Endangered Species Act, National Forest Management Act, or National Environmental Policy Act, when it proposed the Lonesome Wood Vegetation Management 2 Project in the Gallatin National Forest of Montana, even though the decision was inconsistent with the United States Forest Service's reports. The Ninth Circuit's holding demonstrated the wide amount of deference the courts will give the Forest Service when determining the best available scientific data.

I. INTRODUCTION

In *Native Ecosystems Council v. Marten*, the Alliance for the Wild Rockies and Native Ecosystems Council (collectively "Council") brought action to enjoin the United States Forest Service's ("USFS") proposed Lonesome Wood Vegetation Management 2 Project ("Lonesome Wood 2").[1] Council alleged that Lonesome Wood 2 violated the Endangered Species Act ("ESA"), the National Environmental Policy Act ("NEPA"), the National Forest Management Act ("NFMA"), and the Administrative Procedures Act ("APA").[2] Initially, the United States District Court for the District of Montana enjoined the project, holding that the United States Fish and Wildlife Service ("FWS") conducted an improper Biological Opinion ("BiOp") due to the lack of a "site-specific analysis of the [p]roject's impact" on two listed species under the ESA: grizzly bears and Canada lynx.[3] However, after allowing the USFS time to remedy the defects in the BiOps, the district court dissolved the injunction and Lonesome Wood 2 was allowed to proceed.[4] On appeal, the Ninth Circuit affirmed.[5]

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2005, the USFS conducted wildfire assessments and found that fuel buildup near Hebgen Lake in the Gallatin National Forest posed a serious risk to surrounding populations, including private homes, campgrounds, and recreational areas.[6] To mitigate this risk, the USFS proposed Lonesome Wood 2, which would thin large and small trees—some in old growth areas—slash and/or selectively burn, and build

1. Native Ecosystems Council v. Marten, 883 F.3d 783, 787 (9th Cir. 2018).
2. *Id*. at 787-88.
3. *Id*.
4. *Id*. at 788.
5. *Id*. at 787.
6. *Id*.

temporary roads.[7] In 2009, the Council challenged Lonesome Wood 2, but soon after, grizzly bears were relisted as a threatened species under the ESA. The change in status required the USFS to satisfy a different consultation and management criteria. The USFS voluntarily withdrew its assessments, and prepared an Environmental Impact Statement before the district court ruled on the matter.[8] However, after completing the Final Environmental Impact Statement ("FEIS") and the Record of Decision in 2012, the USFS determined that Lonesome Wood 2 was appropriate.[9] In March 2013, the Council challenged the FEIS, and further alleged Lonesome Wood 2 should not be approved due to violations of ESA, NFMA, NEPA, and the APA.[10] The district court enjoined Lonesome Wood 2 due to the inadequate preparation of site-specific BiOps.[11] The parties filed cross-motions for summary judgment, and the court granted partial summary judgment on the ESA claim in favor of Council, but granted partial summary judgment in favor of the USFS on all other claims.[12]

The FWS submitted its third BiOps attempt in April 2016. The court found that these BiOps were sufficient due to the language that addressed the environmental effects—specifically the likelihood of jeopardizing the continued existence of the Canada lynx.[13] Because the court determined the USFS's ESA consultation requirement was satisfied, the court dissolved the injunction and allowed Lonesome Wood to proceed.[14] The Council appealed the district court's orders that dissolved the injunction and granted the USFS partial summary judgment. [15]

III. ANALYSIS

The Ninth Circuit reviews agency compliance with the ESA, NFMA, and NEPA under the "arbitrary and capricious" standard of the APA.[16] Under the APA, agency actions will be upheld "unless it is found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[17] Courts have found an agency action to be arbitrary and capricious if: (i) the agency does not consider all important aspects of a problem, (ii) the agency's explanation for their decision is contrary to the evidence, (iii) the agency's decision cannot be ascribed to

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7. *Id*. at 787-88.
8. *Id*. at 788.
9. *Id*.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*.
14. *Id*.
14. *Id*.
15. *Id*.
16. *Id*. (quoting Defs. of Wildlife v. Zinke, 856 F.3d 1248, 1256-57 (9th Cir. 2017)).

expertise due to its implausibility, or (iv) the agency's decision is unlawful.[18]

Here, the Ninth Circuit affirmed the district court's summary judgment in favor of the Forest Serves because it held that the Forest Service did not act arbitrarily or capriciously under the ESA, NFMA, or NEPA.[19] Thus, the Lonesome Wood 2 was allowed to proceed.[20]

A. Endangered Species Act

The ESA requires federal agencies to use the "best scientific and commercial data available," to ensure that agency actions are not "likely to jeopardize the continued existence of any endangered species or threatened species."[21] The best scientific data requirement means an agency must consider scientific evidence that "is in some way better than the evidence it relies on."[22] However, the Ninth Circuit emphasized that the agency is still given high deference in its scientific determinations and will not be required to consider data that "does not yet exist."[23]

In 2000, Canada lynx were listed as a threatened species under the ESA.[24] The Forest Service and Fish and Wildlife Service ("FWS") agreed not to proceed until forest plans were amended to ensure that the Canada lynx would not be adversely affected.[25] In 2007, the Forest Service adopted the Lynx Amendments to govern the management of the Canada lynx habitat, which were then incorporated into eight forest plans, including the Gallatin National Forest Plan.[26] Along with the Lynx Amendments, the FWS designated 1,841 square miles of critical habitat for the species.[27] Shortly after this designation, the FWS announced that the critical habitat determination had been "improperly influenced . . . and, as a result, may not be supported by the record, may not be adequately explained, or may not comport with the best available scientific and commercial information."[28] Consequentially, the critical habitat designation reinitiated the Section 7 consultation requirement under the ESA.[29]

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17. *Id*. at 788-79 (citing Lands Council v. Powell, 395 F.3d 1019, 1026 (9th Cir. 2005)).
18. *Id*. at 787.
19. *Id.* at 797.
20. *Id*. at 789 (quoting 16 U.S.C. § 1536(a)(2) (2018)).
21. *Id.* at 791 (quoting Kern Cty. Farm Bureau v. Allen, 450 F.3d 1072, 1080 (9th Cir. 2006)).
22. *Id*. (referencing San Luis & Delta-Mendota Water Auth. v. Lock, 776 F.3d 971, 995 (9th Cir. 2014); San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 602 (9th Cir. 2014)).
23. *Id*. at 789.
24. *Id*.
25. *Id*.
26. *Id*.
27. *Id*. (quoting Cottonwood Envtl. Law Ctr. v. Forest Serv., 789 F.3d 1075, 1078 (9th Cir. 2015)).
28. *Id.* (citing *Cottonwood*, 789 F.3d at 1077).

The Lynx Amendments were then revised and contained an exemption that allowed Forest Service fuel treatment projects in wildland urban interface ("WUI") areas if the projects met certain criteria.[30] The Council contended that the WUI exemption was not based on the best scientific data available, due to a competing thesis that determined the WUI exemption should be revised or eliminated.[31] The USFS argued that it adequately considered the competing thesis, but ultimately was not required to reconsider Lonesome Wood 2.[32]

The Ninth Circuit ultimately held in favor of the Forest Service due to the high level of deference agency expertise is owed.[33] USFS was not required to reevaluate its approval based on a conflicting thesis because USFS had still analyzed the effect of Lonesome Wood 2 on the Canada lynx in a site-specific BiOp.[34]

B. National Forest Management Act

The NFMA requires that all national forests operate under "Forest Plans" that are "consistent with each forest's overall management plan."[35] The Council alleged that Lonesome Wood 2 did not adhere to the Forest Plan for the Gallatin National Forest, and therefore, violated NFMA, and must be enjoined.[36] The Gallatin National Forest Plan ("Gallatin Plan") set a goal of "[p]rovid[ing] habitat for viable populations of all indigenous wildlife species and for increasing populations of big game animals."[37] Additionally, the Gallatin Plan required the Forest Service to monitor indicator species to determine population change.[38] The Ninth Circuit analyzed whether the USFS violated these provisions when it approved Lonesome Wood 2, and ultimately held the USFS was in compliance.[39]

The Council contended that Lonesome Wood 2 failed to comply with the Gallatin Plan because the proposal did not fulfill its obligation of ensuring species viability.[40] The Council argued that Lonesome Wood 2 was incompatible with the USFS's established goal in the Gallatin Plan of "providing habitat for viable population of all indigenous wildlife species and for increasing populations of big game animals."[41] While the Ninth Circuit made it clear that the USFS's established goals were

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29. *Id*.
30. *Id*. at 789-90.
31. *Id*. at 790-91.
32. *Id*. at 791.
33. *Id*.
34. *Id*. (citing 16 U.S.C. § 1604(a); 16 U.S.C. § 1604(i)).
35. *Id*.
36. *Id*. at 792 (quoting 36 C.F.R. § 219.19 (2012)).
37. *Id*. (referencing 36 C.F.R. § 219.19(a)(6)).
38. *Id*. at 793-94.
39. *Id*. at 793.
40. *Id*. at 792.

obligations, it did not go so far as to say that the USFS violated the goals in Lonesome Wood 2.[42]

The goals established by the USFS allowed "flexibility in the manner and timing of their achievement."[43] The Ninth Circuit reasoned that the USFS's Lonesome Wood 2 proposal was compatible with the Gallatin Plan goals as long as the proposal does not include actions that contradict "providing habitat for viable populations of all indigenous wildlife species . . . " in the forest as a whole.[44] The Ninth Circuit gave deference to the USFS's interpretation of its goals, since it was not inconsistent with the Plan.[45]

The Council also oppugned that Lonesome Wood 2 was not in compliance with the Gallatin Forest Plan's obligation to monitor management indicator species ("MIS") population trends.[46] However, the Ninth Circuit reasoned that due to the USFS's 2011 Management Indicator Assessment of the area, the USFS had adequately fulfilled its obligations in the Gallatin Forest Plan to monitor the MIS population trends.[47]

C. National Environmental Policy Act

NEPA requires that agencies prepare Environmental Impact Statements ("EIS") for any agency action that "significantly affect[s] the quality of the human environment."[48] To be in compliance with NEPA, the USFS was required to prove it took a "hard look" at the environmental consequences of Lonesome Wood 2.[49] The Ninth Circuit looked to the agency's judgment and determined whether the content and preparation showed that the proposal was informed and allowed for public participation.[50] Here, the Ninth Circuit found that the agency met those standards, and that the USFS was not arbitrary or capricious in its approval of the project.[51]

The Council contended that the approval was arbitrary and capricious because it relied upon "incomplete and misleading" information.[52] The Ninth Circuit found the research articles and memorandum the USFS relied on, while not as detailed and credible as the Council would have liked, were sufficient to defend the USFS's approval of the Lonesome Wood 2 proposal.[53]

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41. *Id.* at 793.
42. *Id*.
43. *Id*.
44. *Id.* (referencing *Auer* deference, Siskiyou Reg'l Educ. Project v. U.S. Forest Serv., 564 F.3d 545, 555, 555 n. 9 (9th Cir. 2009)).
45. *Id*.
46. *Id.* at 793-94.
47. *Id*. at 795 (quoting 42 U.S.C. § 4332(C)).
48. *Id*.
49. *Id*.
50. *Id*. at 796.
51. *Id.* at 795.
52. *Id*. at 795-96.

IV. CONCLUSION

Even though the Ninth Circuit noted that the USFS was "flatly wrong" in the conclusion of a "stable to increasing" population of species, this troubling mistake was not a *significant part* of approving Lonesome Wood 2.[54] However, the USFS was able to describe and analyze various reports supporting their decision, and therefore had met the "hard look" standard. Thus, this opinion enforced the wide deference that the USFS will be given when interpreting their own regulations.

53. *Id.* at 796 (emphasis added).